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**From:** Catlaina Hackworth [chackworth@holcherickson.com]  
**Sent:** Wednesday, January 20, 2010 3:55 PM  
**To:** Julius Genachowski  
**Cc:** Edward Lazarus; Bruce Gottlieb; Colin Crowell; Markham Erickson  
**Subject:** Comments of the Open Internet Coalition in Dockets 07-52, 09-191

**Attachments:** OIC NN Comments FINAL.pdf



OIC NN Comments  
FINAL.pdf (485...

Dear Chairman Genachowski:

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FEB 02 2010

Federal Communications Commission  
Office of the Secretary

Attached is a copy of the submitted comments of the Open Internet Coalition in the above-referenced dockets.

Please

contact Markham Erickson should you have any questions.

Sincerely,

Catlaina Hackworth

chackworth@holcherickson.com

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

**COMMENTS OF THE OPEN INTERNET COALITION**  
**January 14, 2010**

The Open Internet Coalition ("OIC") submits the following comments in response to the Federal Communications Commission's ("Commission" or "FCC") October 22, 2009 Notice of Proposed Rulemaking ("NPRM" or "Notice"), FCC No. 09-93, in the above-captioned proceedings.

Markham C. Erickson  
Holch & Erickson LLP  
And  
Executive Director  
Open Internet Coalition  
400 N. Capitol Street, NW  
Suite 585  
Washington, DC 20001  
Tel.: +1 202 - 624 - 1460  
Facsimile: +1 202 - 393 - 5218  
Email: merickson@holcherickson.com

## EXECUTIVE SUMMARY

The Internet supercharges and combines the power of free speech and free markets, producing the greatest engine of democratic deliberation and economic growth since the introduction of the moveable-type press. Yet the architectural characteristics behind the open Internet's design are being threatened, and the Internet's continued success is not inevitable. The Open Internet Coalition supports common-sense, baseline rules to ensure that the Internet remains a key engine of economic growth, innovation, and deliberation.

For most of the Internet's history, the Commission has protected users' right to choose the content and services they want over their Internet connections. Entrepreneurs, technologists, and venture capitalists have been able to develop new online products and services with the guarantee of neutral, nondiscriminatory delivery to users, which has fueled an unprecedented era of creativity, investment, and growth. Existing businesses have been able to leverage the power of the Internet to develop innovative product lines, reach new consumers across the globe, and create business models. And small businesses, a key creator of jobs and growth in the US economy sector, have used the Internet as a low-cost way to reach new markets and establish relationships with new customers, expanding their businesses in ways unattainable in the pre-Internet era.

The Internet also has been an incredibly important tool in promoting democracy and political discourse. It has empowered individuals of modest means to compete in the marketplace of ideas with the most well-funded institutions. One person with a video recorder and Internet connection can upload events in real-time that change the course of political and social events.

To preserve and protect the attributes of the Internet that create immense value for our economy and our society, the Open Internet Coalition supports the enactment of common sense, baseline rules that would ensure that the broadband Internet access providers that provide the on-ramps and off-ramps to the Internet do not discriminate against users' ability to send and receive lawful content, applications, and services.

The adoption of a simple, strong, nondiscrimination rule, subject to reasonable network management, strikes an appropriate balanced framework that will benefit all stakeholders in the Internet ecosystem.

We also affirm that such rules should apply only to lawful content, applications, devices, and services. Yet, the Coalition cautions the FCC to amend its proposed rule to ensure that the Commission does not put itself in the position of regulating content. Broadband Internet access providers will have the flexibility under the proposed non-discrimination rule to block unlawful content without a complicated and unnecessary content-regulation regime, as currently proposed in the definition of "Reasonable Network Management".

The adoption of rules is timely and urgent. New technologies which provide broadband Internet access providers with the ability to inspect the content of Internet communications and prioritize or degrade those communications depending on how much the content provider is willing to pay are reaching the marketplace. This presents the Commission with an important reason to act now, before retrograde changes become permanently set into the infrastructure of the Internet.

A system that allows for broadband Internet access providers to charge content providers for prioritized service would fundamentally damage the way the Internet has worked. It also would introduce tremendous economic and social costs to our nation, while likely decreasing the incentives for broadband Internet access providers to invest in their infrastructure.

Finally, the enforcement of the proposed rules should be accomplished through a new, simple *ex-poste* complaint process, rather than a more burdensome *ex-ante* regulatory structure. This process is premised on the Commission requiring greater transparency from the broadband Internet access providers.

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**I. THE OPEN INTERNET COALITION**

The Open Internet Coalition ("OIC")<sup>1</sup> represents consumers, grassroots organizations, and technology and Internet companies working in pursuit of a shared goal: keeping the Internet fast, open and accessible to all Americans. We support a process that results in common sense baseline rules to ensure that the Internet remains a key engine of economic growth, innovation, speech, and global competitiveness. The Coalition spans the political spectrum, standing together to protect an open Internet.<sup>2 3</sup>

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<sup>1</sup> [www.openinternetcoalition.com](http://www.openinternetcoalition.com)

<sup>2</sup> Our members include entities such as Amazon.com, American Civil Liberties Society, American Library Association, Association of Research Libraries, Computer & Communications Industry Association, Consumers Union, Data Foundry, DISH Network, Earthlink, eBay, EDUCAUSE, Entertainment Consumers Association, Evite, Free Press, Google, IAC, Internet2, Media Access Project, Mozilla, Netflix, New America Foundation, PayPal, Public Knowledge, Skype, Sony Electronics, Inc., Ticketmaster, TiVo, Twitter, US PIRG, and YouTube, among others. For a full list, see <http://www.openinternetcoalition.com/index.cfm?objectid=0016502C-F1F6-6035-B1264DD29499E9D0>,

## **II. AN OPEN INTERNET IS CRITICAL TO THE CONTINUED SUCCESS OF THE INTERNET IN DRIVING ECONOMIC GROWTH, EMPOWERING USERS, AND ADVANCING FIRST AMENDMENT VALUES**

As the Commission has long recognized, the historically open architecture of the Internet, and its platform as a general purpose technology, uniquely and without precedent allow it to serve as an engine for economic growth. It facilitates electronic commerce, new technologies, and creates jobs. President Obama has emphasized that the Internet adds as much as \$2 trillion to our nation's Gross Domestic Product,<sup>4</sup> and, according to IDC, global information technology employment will grow by almost 42 million jobs by the end of 2013 (from approximately 36 million today).<sup>5</sup> Additionally, 88% of American adults turned to the Internet to cope with the current economic recession, such as looking for jobs, housing options, government benefits, and bargain-hunting.<sup>6</sup>

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<sup>3</sup> This is a consensus document and DISH Network does not necessarily endorse the document in its entirety.

<sup>4</sup> See Executive Office of the President, National Economic Council Office of Science and Technology Policy, *A Strategy for American Innovation: Driving Towards Sustainable Growth and Quality Jobs* at 9, September 2009, available at [http://www.ostp.gov/galleries/press\\_release\\_files/SEPT%2020%20%20Innovation%20Whitepaper\\_FINAL.PDF](http://www.ostp.gov/galleries/press_release_files/SEPT%2020%20%20Innovation%20Whitepaper_FINAL.PDF)

<sup>5</sup> See *The Economic Impact of IT, Software, and the Microsoft Ecosystem* at 2, IDC White Paper, October 2007, available at [www.idc.com](http://www.idc.com)

<sup>6</sup> See Exec. Ofc. of the President, Nat'l Econ. Council/OSTP, *A Strategy for American Innovation: Driving Towards Sustainable Growth and Quality Jobs*,

An integral part of the Internet's seamless design is that it does not distinguish between Web sites of super-capitalized corporations and those of mom-and-pop small businesses. In only 15 years the commercial Internet has transformed the U.S. economy. A company that starts in a garage with little more than a computer and a basic Internet connection can be transformed into a worldwide economic phenomenon in only a few short years.<sup>7</sup>

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Sept. 2009, at 5, available at <http://www.whitehouse.gov/administration/eop/nec/StrategyforAmericanInnovation>

<sup>7</sup> This statement is almost a truism at this point, but *see also*, Julius Genachowski, "Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity," Speech for the Brookings Institution, September 21, 2009.

It is easy to look at today's Internet giants - and the tremendous benefits they have supplied to our economy and our culture - and forget that many were small businesses just a few years ago, founded on little more than a good idea and a no-frills connection to the Internet. Marc Andreessen was a graduate student when he created Mosaic, which led to Netscape, the first commercially successful Web browser. Mark Zuckerberg was a college student in 2004 when he started Facebook, which just announced that it added its 300 millionth member. Pierre Omidyar originally launched eBay on his own personal website. Today more than 600,000 Americans earn part of their living by operating small businesses on eBay's auction platform, bringing jobs and opportunities to Danvers, Massachusetts, Durham, North Carolina and Lincoln, Nebraska, and many other communities in both the rural and urban America. This is the power of the Internet: distributed innovation and ubiquitous entrepreneurship, the potential for jobs and opportunity everywhere there is broadband.

In observing that small businesses create 65% of new jobs, President Obama noted that "once in a while a small business becomes a big business - and changes the world," at 4. *See* Remarks by President Obama on Job Creation and Economic Growth at the Brookings Institute, December 8, 2009, available at <http://www.whitehouse.gov/the-press/-office/remarks-president-job-creation-and-economic-growth>

The key reason for this is because the Internet's open architecture precludes entrenched incumbents from paying broadband Internet access providers to preserve market dominance over would-be competitors. Instead, the Internet's open architecture allows worldwide users to make decisions about what businesses and which voices succeed and fail in the Internet ecosystem.

#### **A. The Internet Supports Small Businesses.**

The Internet's innovate-without-permission architecture is vital because small businesses are the keys to the success of the U.S. economy. According to the U.S. Small Business Administration, small firms employ just over half of all private sector employees and pay 44 percent of total U.S. private payroll. Over the past 15 years, small businesses have generated roughly 65 percent of net new jobs.<sup>8</sup>

These small businesses increasingly rely on the open Internet to grow and to increase their sales. In 2002, the Small Business Administration noted that 57 percent of small businesses were using the Internet, with 61 percent of them having a website. Of those small businesses operating a website, 67 percent said they gained new customers, 56 percent increased total sales, and 56 percent attracted new types of customers.<sup>9</sup>

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<sup>8</sup> U.S. Small Business Administration, Office of Advocacy, Updated September 2009, available at <http://www.sba.gov/advo/stats/sbfaq.pdf>

<sup>9</sup> John Deighton and John Quelch, "Economic Value of the Advertising-Supported Internet Ecosystem," June 10, 2009, pg. 60, available at <http://www.iab.net/economicvalue>

There are millions of examples of small businesses that have succeeded because of and due to the open platform of the Internet. The following are just a few examples.

### **1. Quick Ship Electronics.**

Quick Ship Electronics, from Woodinville, Washington, was started three years ago as a part-time business by Jordan Insley, a 27 year-old entrepreneur.<sup>10</sup> Within two years, Quick Ship Electronics, which sells on eBay, became Insley's full-time business, and he was successfully selling electronics from a three car garage.<sup>11</sup>

Today, Insley has moved his business into a 3,000 square foot warehouse. Last year, he sold approximately 233,000 iPods and hired three full-time employees. He averages selling and shipping 200 packages of electronics goods a day, though he has sold as many as 2,512 goods in one day.<sup>12</sup> Insley represents only one of the hundreds of thousands of individuals and small businesses that use the eBay marketplace to reach consumers across America and to export products around the world.

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<sup>10</sup> See <http://stores.ebay.com/Quick-Ship-Electronics>

<sup>11</sup> See <http://www.youtube.com/watch?v=bjA9eTIC1qc>

<sup>12</sup> See John Donahoe, President & CEO, eBay, interview of Jordan Insley, <http://ebayinkblog.com/2009/09/09/video-john-donahoe-meets-with-quick-ship-electronics/>.

## **2. Twiddy & Company Realtors.**

The Twiddy Family, of Twiddy & Company Realtors<sup>13</sup> ("Twiddy") in the Outer Banks of North Carolina, is a family-owned realty company that specializes in vacation rentals and real estate sales in Duck and Corolla in the Outer Banks of North Carolina. Initially, Twiddy relied solely on traditional marketing collateral, such as brochures and print ads to promote its business. Recently, the company has discovered a more cost-effective and successful way to bring an age-old industry into modern times. With Google AdWords, Twiddy immediately can change its advertisements and listings to reflect changes made to homes throughout the season, create more ads depending on available inventory, and remove ads promoting a specific property once it is booked.

This flexible system helps Twiddy to react to the ever-changing market and customize its site and advertising strategy to fit potential needs of its customers.

In addition, Twiddy implemented Google Analytics and used the data to revamp its Web site. Internet traffic reports are run regularly to determine how to best update and tailor the site to meet customer demands. As a result, in the past year, the percentage of bookings made online jumped 50 percent and clicks on Twiddy's advertisements increased by 26 percent.

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<sup>13</sup> See [www.twiddy.com](http://www.twiddy.com)



The Twiddy family provided the following quotation for this OIC submission:

For the majority of our 31-year history, our small family owned business had a hard time convincing new guests it was a good idea to vacation on the ocean. If anyone had heard of the Outer Banks of North Carolina, it was either windy enough to help the Wright Brothers fly the first plane or isolated enough to be a favorite haunt of Blackbeard the pirate. Since the introduction of the Internet, Twiddy & Company's supply of vacation homes has increased by 41 percent and the number of rented vacation weeks has grown by 69 percent. The number of employees at the company has grown 33 percent.

In a stunningly small amount of time, the Internet became the essential channel guests use to help plan and determine their vacations. It's also become the main focus of our company's marketing and advertising strategies. The backbone of this unprecedented growth is connectivity. *Now, more than ever, the Internet influences guests' behavior and spending decisions. It is the catalyst; without it, the market develops bottlenecks.*

(emphasis added)

### **3. Carolina Rustica.**

Carolina Rustica, is a bricks-and-mortar and on-line retailer of hand-forged furniture, owned by Richard Sexton and based in Concord, North Carolina. In 2002, four years after the company began a Web site, Sexton opened a Google AdWords account, which resulted in increasing sales by 50 percent – a growth trend that continues to this day. Approximately 30 percent of Sexton's traffic is driven by AdWords.

Sexton also uses Google Analytics to continually refine his marketing approaches, and he uses Google Checkout and eBay's PayPal to provide fast, safe convenient checkout options.

Mr. Sexton provided the following language for this submission:

My small company would probably not exist without the opportunities that exist on the Internet. We are a small, family-owned furniture and lighting company that represents high-end brand names, most of whom still manufacture here in the U.S. The relative exclusivity of our brands means that we have a limited local market with plenty of competition to go around. Through our various Web-based marketing efforts, however, we are able to sell our products to customers in every state of the country as well as Canada and overseas. Our business has achieved annualized growth of 25 percent per year since its founding in 2000. We have over 30,000 products online from 70 manufacturers. We are still a small business with eight (8) employees and a parrot for a mascot, but we have a truly global reach thanks to advertising platforms provided by Google and others.

#### **4. The Relatively New Contribution from Social Networking and Social Media Sites.**

We still only are seeing the beginning of how the open Internet is strengthening and transforming businesses. The relatively new phenomenon of social networking and social media platforms are providing even newer ways for users to discover small businesses that have a good idea or good product to sell.

**a. Bonobos, Inc.**

Bonobos, Inc.<sup>14</sup> is a men's clothing company created in 2007 by two roommates while at Stanford Business School. Through innovative Facebook advertising that allows companies to specifically interact with their audience, Bonobos sold over 30,000 pairs of pants and garnered \$2 million in sales in less than a year after launching the company. Today, Bonobos has 2,837 fans on its Facebook page.<sup>15</sup> And last year, Bonobos was named one of America's Hottest Brands by Advertising Age.<sup>16</sup>

**b. Playdom.**

Playdom is the largest company for social gaming applications.<sup>17</sup> It is the largest social game developer on MySpace and one of the largest developers on Facebook, with over 20 million users accessing Playdom through MySpace and Facebook each month. Its success allowed it to purchase game-developer Green Patch and iPhone developer Trippert Labs, which raised over \$43 million in funding from venture capitalists and will allow the company to bring aboard an additional 15 full-time employees and hire 65 contractors.

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<sup>14</sup> See [www.bonobos.com](http://www.bonobos.com)

<sup>15</sup> See <http://www.facebook.com/bonobos?ref=search&sid=589864494.1570396644..1> (last visited January 10, 2009)

<sup>16</sup> Matt Kinsey, "Bonobos: an America's Hottest Brands Case Study," Advertising Age. Nov. 16, 2009.

<sup>17</sup> See [www.playdom.com](http://www.playdom.com)

**c. fbFund.**

The success of innovation on Facebook's platform led Facebook to establish an annual fbFund<sup>18</sup> — a \$10 million seed fund that gives users a voice in determining the top five application submissions, where each winner receives a \$250,000 prize.

**B. The Open Internet's Advancement of First Amendment Values.**

Maintaining an open Internet is crucial to all users in safeguarding and further advancing First Amendment values. As the Supreme Court has noted, "it is no exaggeration to conclude that the content on the Internet is as diverse as human thought."<sup>19</sup> These values are at risk because of potentially discriminatory policies implemented by a handful of companies that provide access to and from the Internet. The Commission has an obligation to promote and protect such First Amendment values by adopting rules to preserve access to the Internet.<sup>20</sup>

Even though broadband Internet access providers are now classified as "information service providers," they in fact produce little information themselves save what they create on their own Web sites. Rather, the myriad users of the Internet provide information that is broadly and widely

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<sup>18</sup> See <http://fbFund.com>

<sup>19</sup> *Reno v. ACLU*, 521 U.S. 844, 852 (1997) (quoting *ACLU v Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996).

<sup>20</sup> In addition, as stated later in the OIC's comments, the Commission needs to delete the content-specific provisions to the Reasonable Network Management rule to also protect First Amendment principles.

disseminated on the Internet. As such, the Internet is not only becoming the dominant source for big media companies to disseminate news, but the collaborative and open network architecture of the Internet allows hundreds of millions of users to share ideas and worldwide events instantaneously and in real time.

When opposition protests broke out in Iran following the presidential election, the Iranian government attempted to block cell phones and text messaging and deny access to many social networking sites to prevent the spread of speech and discontent.

Quickly, however, Twitter became the medium of choice with protesters tweeting minute-by-minute updates, allowing the world to know what was happening in Tehran and giving the protesters a voice when their government did not want them to be heard. Tweets became so vital to the coverage in Iran that Twitter delayed scheduled site maintenance in order for the political organizing in Iran to continue with minimal disruption. Iranians used all forms of new media to organize themselves and their message: Facebook was used to organize rallies, YouTube was used to distribute to videos of protests, and Google Maps was used to track where government tanks were located.<sup>21</sup>

Indeed, when one surveys the brutal crackdown of civil liberties in Iran, it becomes clear how vital an open Internet is to maintaining the hallmarks of our

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<sup>21</sup> See Brad Stone and Noam Cohen, "Social Networks Spread Iranian Defiance Online," *The New York Times*, June 16, 2009, pg. 11.

democracy. Americans experience unparalleled freedoms and liberties, and the Internet is becoming the preferred method to exercise these guaranteed rights. Only on a neutral platform can consumers gain equal access to both the New York Times and the Wall Street Journal; can Tea Party or Greenpeace activists organize their members and rallies; or can users download the King James Bible or the Qur'an.

Consequently, the Commission's rules should protect and promote access to and from a content-neutral, viewpoint-neutral platform to help fulfill the mandate of the First Amendment. In this way, the government will protect and promote the public's right to access diverse and varied social, political, and artistic expression.

### **III. IT IS IMPORTANT TO ESTABLISH RULES TO PRESERVE AND PROTECT THE OPEN INTERNET NOW.**

The Coalition notes that this proceeding builds upon an already robust docket, covering several years. Each of the Commission's actions regarding consideration of protecting the open Internet has created a surge of support from a wide array of stakeholders, including corporations, millions of users, civil rights groups, consumer advocates, and other stakeholders — leaving no doubt that it is time to set rules that protect the Internet from being controlled and balkanized by the companies that provide the on-ramps necessary for users to access the world-wide network.

Since first requesting public input on Internet openness, the Commission has received more than 100,000 pages comprising around 40,000 filings from public and private parties.<sup>22</sup> On the issue of applying openness rules to wireless networks alone, the Commission received nearly 5,000 filings comprising more than 27,000 pages.<sup>23</sup> With the addition of materials generated by the current Rulemaking, and with the addition of the docket generated by the Skype Petition (see below), the Coalition believes that this is the optimal time to adopt rules to preserve and protect the open Internet.

**A. Request to Incorporate the Skype Petition in the Present Rulemaking.**

Preserving openness beyond the principles that the Commission now proposes, Skype Communications ("Skype") filed a petition in 2007 to request that the Commission apply the same openness principles that *Carterfone* set out for traditional wireline networks to wireless networks ("Skype Petition").<sup>24</sup>

The Open Internet Coalition formally requests that the Commission incorporate the Skype Petition docket into this rulemaking to further inform the Commission's consideration of wireless issues.

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<sup>22</sup> In the Matter of Preserving the Open Internet, GN Docket No. 09-191; Broadband Industry Practices, WC Docket No. 07-52, Paragraph 2.

<sup>23</sup> In the Matter of Preserving the Open Internet, GN Docket No. 09-191; Broadband Industry Practices, WC Docket No. 07-52, Paragraph 39.

<sup>24</sup> See Petition of Skype Communications S.A.R.L. to Confirm a Consumer's Right to Use Internet Communications Software and Attach Devices to Wireless Networks, RM-11361 (filed Feb. 20, 2007).

## **B. Deep Packet Inspection Technology Is Further Reason to Adopt Rules Now.**

In his September 2009 speech at the Brookings Institution, Commission Chairman Julius Genachowski laid out several reasons why a "wait and see" approach to openness rules will no longer work. First, limits on competition between access providers are only intensifying as more consumers adopt broadband, narrowing those consumers' choices. Second, those Internet access providers currently rely on revenues from video and voice products, creating a dynamic that may reward blocking or slowing competing services. And third, Internet traffic is growing faster than current network management technologies may soon be able to handle, increasing the risk that openness will suffer as access providers struggle to keep up.<sup>25</sup>

As discussed in detail later in these comments, the advancement and marketing of Deep Packet Inspection ("DPI"), makes blocking, delaying, or otherwise mistreating certain types of Internet traffic faster, cheaper, and easier for broadband access providers. Comcast's use of this technology as found in the Commission's Comcast Order reveals that it is not science fiction but an imminent threat to Internet's openness.

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<sup>25</sup> Julius Genachowski, "Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity," Speech for the Brookings Institution, September 21, 2009.



### **C. The Recent Emergence of High Quality Online Video and Multi-Media IP-Enabled Services Raises the Stakes to Act.**

The relatively recent emergence of high quality and high definition Internet video that potentially competes with offerings from broadband Internet Access providers certainly adds further reason for the Commission to act now, before these offerings are singled out for discrimination. Online video providers such as Amazon.com, Netflix, Blockbuster.com and others provide high quality video content that competes with traditional video offerings from the network operators.

In addition, at the recently-held Consumer Electronics Show, two television manufacturers announced that they will embed Skype technology in televisions with Internet connections, allowing users with Web cameras and microphones to have consumer video conferences. These and other IP-enabled technologies, such as Internet widgets available through television sets, will increasingly pose a threat to broadband Internet access providers. As this market emerges, the time to enact rules could not be more appropriate.

### **IV. CODIFYING A PRINCIPLE OF NON-DISCRIMINATION**

The Open Internet Coalition supports a strict non-discrimination rule, subject to reasonable network management. The Coalition supports the